WARRANTIES AND SIMILAR AGREEMENTS.

IN the decisions upon the subject of warranties and stipulations of that nature it is true that there is some confusion, but its extent is often overstated. Many of the opinions on the subject are much worse than the actual decisions. Rejecting the bad opinions and accepting the decisions, we find the rules followed by the courts of different jurisdictions very nearly uniform.

There is much misuse of the term "warranty." It is applicable properly only to agreements which are collateral to the main object of a contract of sale, namely, the passage of title; but it is frequently applied to agreements and conditions which are not collateral to the passage of title, but without the fulfilment of which no title can pass. A correct use of the term is important chiefly when it becomes necessary to consider what remedy is proper where the contract has not been fully performed, and but incidentally when it is being determined what the contract originally included.

The fact that a certain provision, if it existed, would or would not be a warranty, as distinguished from a part of the principal contract of sale, has no direct bearing on the question of the existence of the provision. The usual criterion by which to determine that a particular provision is a warranty is that the contract relates to specific goods, and the provision is intended to continue in force after the passage of title. To say that a certain provision shall or shall not be implied in a contract because it will or will not be a warranty makes its existence depend in a measure on the fact that the contract relates to specific or non-specific goods. That dependence is to be placed on that fact is frequently stated, but the point is seldom involved in a decision. To make the protection which a buyer may reasonably expect depend on the opportunity that he has to inspect the goods which he buys, or on the reliance which he reasonably places upon the seller's judgment or skill, is reasonable. To make it depend on the fact that the goods are or are not specific is arbitrary. There is no reason which commends itself why a buyer who orders cotton generally should be entitled to a quality better than that which he could have required if he had bought a specific bale. Fortunately there are many cases

which are decided as if there were no distinction, but unfortunately there are too few in which the distinction is expressly disregarded. There is no exception to the rule of *caveat emptor* which has been uniformly made to depend upon a distinction between specific and non-specific goods. Therefore in considering what agreements are implied in a contract of sale, we are not assisted by dividing the subject on a theory dependent upon this distinction.

In a sale of goods, or a contract to supply them, it frequently happens that a buyer who has received an express agreement concerning the quality or adaptability of his purchase, wishes to rely on the agreement which would have existed by implication but for the express one. The express provision does not necessarily exclude any implied agreement.[1] If, however, it covers the same general subject-matter it does exclude any implied agreement.[2] Just where the line lies is not a question which belongs properly with the present discussion. It is an independent subject, which is mentioned but incidentally.

Another matter, foreign to the present, but so intimately connected therewith that it should be mentioned, is that of usage and custom. Some effect will be given to a usage or custom in its bearing upon a contract of sale and its fulfilment. It must be universal in the particular trade in which the contract is made[3] and must not contradict settled rules of law.[4] It is said that one may be enforced which tends merely to explain the meaning and intention of the parties.[5] It should be a regulation of the method of doing business, and not a determination of the legal results of unequivocal acts. A custom limiting the time during which goods might be rejected has been enforced.[6] This subject should be considered as an independent topic.

The well-settled rule in sales is *caveat emptor*, a rule which has many exceptions. These all rest upon one or the other of two

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[1] Bigge *v.* Parkinson, 7 Hurl. & Norm. 955.

[2] International Pavement Co. *v.* Smith, Beggs, & Ranken Machine Co., 17 Mo. Ap. 264; Wood Mowing and Reaping Machine Co. *v.* Bobbst, 56 Mo. Ap. 427; White *v.* Gresham, 52 Ill. Ap. 399.

[3] Snow *v.* Shomacker Mfg. Co., 69 Ala. 111.

[4] Thompson *v.* Ashton, 14 Johns. (N. Y.) 316; Rice *v.* Codman, 1 Allen (Mass.), 377; Dickinson *v.* Gay, 7 Allen (Mass.), 29; Barnard *v.* Kellogg, 10 Wall. 383. But see Fatman *v.* Thompson, 2 Disney (Oh. Super.), 482.

[5] Barnard *v.* Kellogg, 10 Wall. 383.

[6] Carleton *v.* Lombard, 72 Hun (N. Y.), 254; The Chicago Packing and Provision Co. *v.* Tilton, 87 Ill. 547.

grounds, — the reliance naturally placed by a buyer on a seller's statements or superior knowledge, and the advisability of protecting buyers who have no opportunity to inspect the goods which they are buying. Primarily, the first of these rests on the position of the seller, and the second on that of the buyer. One naturally relies upon the descriptive statements of the person from whom he buys, or, if the latter is in a situation to know more of the qualities of an article or of its adaptability to a particular use, the former naturally defers to the knowledge of the latter. In one case an additional undertaking is implied from the seller's words, and in the other from his position. Where the seller makes no statements and occupies no better position than the buyer, there may still be an undertaking implied, if goods are bought which there is no opportunity to inspect. It is of advantage to the public to encourage trade in goods lying at a distance. A buyer should be made to feel as safe in dealing with such goods as he is when he has an opportunity to inspect before buying. This is without regard to the seller's statements or knowledge of the goods. He is holden to an undertaking to protect the buyer who is to receive from him goods on which he has never been given an opportunity to exercise his judgment. The first exception requires that goods shall correspond to the description of them in kind and quality, and shall in certain instances be adapted to the purpose for which they are sold; and the second, that goods sold by description, and which the buyer has no opportunity to inspect, shall be of a merchantable quality. When neither ground for exception exists, the rule of *caveat emptor* applies.

One of the most common ways in which goods are described is by reference to a sample. To have a sample affect a case it must appear that a sale by sample was contemplated. This involves a question of fact simply. As is the case with other such questions, the evidence will sometimes be so clear that the court will be required to direct a verdict. The mere production and display of a sample are not sufficient to make a sale one by sample.[1] When a sample has been shown to the buyer, there will sometimes be other circumstances which will make it wrong for the court to allow the jury to find that the sale was by sample.[2] The fact that the buyer was given an opportunity to inspect the goods as well as

[1] Proctor *v.* Spratley, 78 Va. 254; Walter A. Wood Harvester Co. *v.* Ramberg, 61 N. W. R. (Minn.) 1132.

[2] Selser *v.* Roberts, 105 Pa. St. 242.

the sample strongly indicates that a sale by sample was not contemplated,[1] and should generally be conclusive. It cannot fairly be said that a seller who shows a sample, and at the same time tenders to the buyer an opportunity to see the goods, manifests an intention to undertake that the goods are equal to the sample. The fairer inference is that he wishes the buyer to satisfy himself of the quality of the goods by an inspection before purchase. There may be qualities apparent in the sample which are not apparent upon an inspection of the bulk of the goods. As to these the buyer cannot properly be said to have had an opportunity to inspect, and his right to corresponding qualities in the bulk should not be held to be impaired. To that extent the sale may still be one by sample. To establish a sale by sample it is generally said that it must appear that the sale was made solely with reference to the sample.[2]

A sale by sample is not essentially different from a sale by description. It is a sale by description by reference to the sample. The extent of this description varies. If the parties contemplate that the sample shall be subjected to some test, the reference to the sample is a description of whatever qualities or defects this test will disclose. It is generally a description of whatever the sample presents to the sight or other senses.

The goods must correspond in kind and quality to the sample. In conflict with this almost universal rule it is held in Pennsylvania that the goods need correspond only in kind and not in quality with the sample.[3] Where goods are described by words as well as by sample, they must correspond to the express description[4] as well as to the sample.

Where the goods are defective, the fact that the sample is defective in the same particular will not lessen the seller's liability, provided the defect was not perceptible on an examination of the sample.[5] The reason for this is that no more is described by a reference to a sample than appears on an inspection of it. Conversely, where the goods are defective in a particular which is not perceptible on an inspection of the sample, the fact that the sample did not contain this defect should not increase the seller's liability. This follows from the same reason. This view has

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[1] Barnard *v.* Kellogg, 10 Wall. 383.

[2] Nichol *v.* Godts, 10 Exch. 191.

[3] Sidney School Furniture Co. *v.* School Dist. of Warsaw, 7 Atl. Rep. (Pa.) 65.

[4] Nichol *v.* Godts, 10 Exch. 191; Gould *v.* Stein, 149 Mass. 570.

[5] Moody *v.* Gregson, L. R. 4 Exch. 49; Drummond *v.* Van Ingen, 12 App. C. 284.

been indicated in a conservative *dictum* in which it was suggested that a dealer selling by sample would not be liable for latent defects in the goods which did not occur in the sample, and which arose from the work of former growers or manufacturers.[1]

The cases generally make no distinction in sales by sample between specific goods, non-specific goods, and those not manufactured at the time of the formation of the contract. There should be no distinction. A buyer naturally relies on the description which the sample conveys to him, as much where he knows that the goods which he is purchasing bear particular marks and are stored in a particular place as where he knows that no goods are yet in existence.

Where there is an express description of the goods, the expression may be a statement of the seller's opinion merely, or it may be a representation of fact. This depends upon the intention in the use of the words, which is to be inferred from all the circumstances, and should be decided by the jury.[2] The circumstances may be such that it will be the duty of the court to order a finding the one way or the other.[3] The circumstance which has the most important bearing upon this question is that the buyer did or did not have an opportunity to inspect. The fair inference is that any statements concerning the things which are apparent upon inspection were of opinion merely, if there was an inspection. Where there is no inspection, or where an inspection will reveal nothing, the opposite inference is fairer. The circumstance that the seller occupies a position of vantage through his superior skill or knowledge tends to show that the statement was more than one of opinion.

What is an opportunity to inspect should be treated as a question of practical business.[4] It may exist although inspecting would be laborious and unusual,[5] but does not where the value of the goods would be greatly diminished by an inspection.[6] An opportunity to inspect is not always tantamount to an inspection.[7]

Where the seller occupies no better position than the buyer, the

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1 Bradford *v.* Manly, 13 Mass. 139.
2 Power *v.* Barnum, 4 Ad. & El. 473; Ransberger *v.* Ing, 55 Mo. Ap. 621.
3 Jendwine *v.* Slade, 2 Espinasse, 572.
4 Beals *v.* Olmstead, 24 Vt. 114.
5 Barnard *v.* Kellogg, 10 Wall. 383.
6 Lewis *v.* Rountree, 78 N. C. 323.
7 Gould *v.* Stein, 149 Mass. 570.

sale is on inspection, and the goods are specific, a description of the species of the goods by the seller should not impose upon him any liability, but should be treated as a statement of opinion, or, better, a statement made solely for the purpose of identifying the subject-matter of the sale. It would be generally so held. To this extent it is true that in the present sale of specific, inspected goods there is no implied warranty. Where, however, the species of the goods is not perceptible on inspection, the finding that the description by the seller of the kind of the goods is an undertaking by him, and not merely an expression of opinion that the goods are of the kind described, is not only permissible,[1] but perhaps necessary.[2] In the absence of qualifying facts, it should be necessary, as the position of the buyer is the same that it would have been if there had been no inspection, and he naturally relies on the seller's statement as much as he would have relied had there been no inspection. The two prominent early New York cases[3] in which the opposite finding was sustained are virtually overruled. In Pennsylvania it has been held that a finding that the description by the seller is an undertaking by him is not permissible.[4] This seems a trifle inconsistent with an earlier decision[5] holding that there was such an undertaking where, although no inspection, there was an opportunity to inspect, and a difference in kind apparent upon inspection. This case is readily distinguishable from the others in the fact that there was no actual inspection.

Where the seller occupies no better position than the buyer, the sale is on inspection, and the goods are not specific, the rules should be the same that they are where the goods are specific. If inspection discloses the kind, a description of kind should be held not to be an undertaking. If inspection does not disclose the kind, the case should be decided as it would have been had there been no inspection.[6] The force to be given to a description of goods by a seller should depend upon the reliance which the buyer will naturally place upon it, and that reliance will not be affected by the fact that the goods are or are not specific. It would probably be held that this fact did not affect the obligation of the seller.

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[1] Wolcott *v.* Mount, 7 Vroom (N. J.), 262; Sparling *v.* Marks, 86 Ill. 125.

[2] Hawkins *v.* Pemberton, 51 N. Y. 198. See also Jones *v.* George, 61 Texas, 345.

[3] Seixas *v.* Wood, 2 Caines (N. Y.), 48; Swett *v.* Colgate, 20 Johns. (N. Y.) 196.

[4] Lord *v.* Grow, 39 Pa. St. 88; Shisler *v.* Baxter, 109 Pa. St. 443. See also Kircher *v.* Conrad, 23 Pac. R. (Mont.) 74.

[5] Borrekins *v.* Bevans, 3 Rawle (Pa.), 23.

[6] Lewis *v.* Rountree, 78 N. C. 323.

Where the sale is not on inspection and the goods are specific, a description of the species of the goods by the seller should be held to be an undertaking by him that they are of the kind described.[1] It is evident that a buyer who has not had an opportunity to inspect is entitled to as much protection and relies as much on a seller's statements as a buyer who has inspected goods the species of which is not perceptible on inspection. The rights of the latter have just been considered. The rule should be the same where the goods are specific that it is where they are not. The reason for this is suggested in the preceding paragraph. It would probably be so held.

Where the sale is not on inspection and the goods are not specific, it is well settled that a description by the seller of the kind of the goods is an undertaking by him that they shall be of that kind, or, as is usually said, the goods must be of the kind specified in the contract.[2]

What has been said concerning statements regarding species applies to those regarding quality. The fact that there is no inspection, or that the quality is not perceptible on inspection, or that the goods are specific, has substantially the same effect in determining whether a statement regarding quality was a representation of fact or of opinion that it has in determining the same question where the statement relates to kind. Where the statement is a representation of fact, it places upon the seller an obligation that the goods correspond in quality to the description;[3] but if it is merely an expression of opinion, it does not affect his liability.[4] The former is part of the contract, while the latter is not. The tendency is to treat all material statements concerning quality as part of the contract. A reason which would frequently justify giving more effect to statements concerning quality than to those concerning kind is that a description of kind is frequently necessary for the purpose of identifying the subject-matter of the sale, which is more seldom true of a description of quality.

Where the positions of the buyer and seller are equal, nothing is said concerning quality, the goods are purchased upon inspection,

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[1] Lyon *v.* Bertram, 20 How. 149 (*dictum*); Borrekins *v.* Bevans, 3 Rawle, 23; Barr *v.* Gibson, 3 M. & W. 390 (*dictum*).

[2] Nichol *v.* Godts, 10 Exch. 191; Weiler *v.* Schilizzi, 17 C. B. 619; White *v.* Miller, 71 N. Y. 118; Gould *v.* Stein, 149 Mass. 570; Coyle *v.* Baum, 3 Oklahoma, 695.

[3] Hobart *v.* Young, 21 Atl. R. (Vt.) 612.

[4] Ransberger *v.* Ing, 55 Mo. Ap. 621.

and are specific, there is no undertaking by the seller that they are of any particular quality.[1]

Where the goods are not specific, the rule should be the same.[2] There is no reason for a different rule. Although a number of decisions are limited expressly to the case of specific goods, yet many have been made in which the difference between specific and non-specific goods has not been mentioned. The rule may be safely said to be the same for each.

In South Carolina the rule seems to be that there is a warranty of quality in the sale of specific goods on inspection.[3] This has been said to be limited to latent defects,[4] and it has been held to be proper to leave the question of its existence to the jury.[5] One early case is decided as if the rule in South Carolina were the same as elsewhere.[6] The later cases in overruling this appear not to have noticed it. The rule is commonly stated in the form that a sound price implies a warranty of soundness.[7] The decisions in which this is reiterated are sustainable upon other grounds,[8] but in view of the frequency of the repetition of the statement it may be regarded as settled law.

Where there is no opportunity to inspect and the goods are specific, it should be held that there is an undertaking by the seller that they are of a merchantable quality. It is so held in the case of non-specific goods, and the rule should not be different in the case of specific goods. The reason for the rule requiring a merchantable quality in any case is that the needs of business demand that a buyer trading at a distance should be protected as fully as one who buys after inspecting. This reason is as applicable where the goods are specific as where they are not. It has been intimated that the rule differs in the two cases,[9] while in some decisions it has been stated broadly without reference to any

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[1] Hyatt *v.* Boyle, 5 Gill & J. (Md.) 110; Parkinson *v.* Lee, 2 East, 314; Emmerton *v.* Matthews, 7 H. & N. 586; Barnard *v.* Kellogg, 10 Wall. 383; Moses *v.* Mead, 43 Am. Dec. (N. Y.) 676; Rayner *v.* Rees, 27 Chic. Leg. News, 296; Needham *v.* Dial, 4 Tex. Civ. Ap. 141.

[2] T. B. Scott Co. *v.* Hafner-Lothman Mfg. Co., 91 Wis. 667.

[3] Vaughan *v.* Campbell, 2 Brevard (S. C.), 53.

[4] Rose *v.* Beatie, 2 N. & McC. (S. C.), 538.

[5] Whitefield *v.* M'Leod, 2 Bay (S. C.), 380.

[6] Neilson *v.* Dickenson, 1 De S. (S. C.), 133.

[7] Lester *v.* Execs. of Graham, 1 Mill (S. C.), 182.

[8] Timrod *v.* Shoolbred, 1 Bay (S. C.), 324; Barnard *v.* Gates, 1 Nott & M. (S. C.), 142; Missroon *v.* Waldo, 2 N. & McC. (S. C.), 76; Bulwinkle *v.* Cramer, 27 S. C. 376.

[9] McClung *v.* Kelley, 21 Iowa, 508; Hood *v.* Bloch, 29 W. Va. 244.

distinction.[1] In the leading case on the subject the court states that it knows of no case in which the rule of *caveat emptor* has been applied where there has been no opportunity to inspect or no waiver of such an opportunity.[2] The Massachusetts court remains tentative concerning the distinction.[3] It probably does not exist generally.

Where there is no opportunity to inspect and the goods are not specific, it is settled that there is an undertaking by the seller that they shall be of a merchantable quality; that is, of a quality merchantable under the description of them contained in the contract.[4]

This undertaking by the seller should be so limited that it would not cover lack of merchantability arising from defects not apparent on inspection. This limitation is one which has not been distinctly made, although it is involved in at least one recent decision,[5] but seems not to have been recognized. It applies equally where the goods are specific and where they are not. The reason for requiring a merchantable quality is to protect a buyer who has no opportunity to inspect, as fully as one is protected who does inspect; but in the absence of the limitation suggested the former is more fully protected than the latter. The opportunity to inspect enables the latter to guard against defects in quality which are apparent, but he still runs the risk of all hidden defects. The former should run the same risk. It is uncertain whether this limitation will receive any support. It certainly deserves it. To hold that a buyer who purchases goods which he has never seen is protected if they have a defect which cannot be discovered, which renders them unmerchantable, while holding that the same buyer, had he seen the same goods before purchasing, would have been without protection, is a ruling that has little to commend it.

Where the seller occupies a position of vantage over the buyer, through his superior skill or knowledge, his undertaking is greater than is that of an ordinary seller. The most common instance of this is where he is a manufacturer or grower, but it should not be

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[1] Gardner *v.* Gray, 4 Camp. 144; Carleton *v.* Lombard, 72 Hun, 254.

[2] Jones *v.* Just, L. R. 3 Q. B. 197.

[3] Murchie *v.* Cornell, 155 Mass. 60.

[4] Gardner *v.* Gray, 4 Camp. 144; Laing *v.* Fidgeon, 6 Taunt. 108; Jones *v.* Just, L. R. 3 Q. B. 197; Hood *v.* Bloch, 29 W. Va. 244; Murchie *v.* Cornell, 155 Mass. 60; Alden *v.* Hart, 37 N. E. R. (Mass.) 742.

[5] Healy *v.* Brandon, 66 Hun, 515.

confined to these cases. The reason for this additional undertaking is that the buyer naturally relies upon the judgment of a seller whose knowledge or skill is superior to his own. From the fact that a seller is a manufacturer or grower, it is fairly presumed that he has this superiority. Hence it has been settled that these two classes of sellers undertake more of a liability than others. When, however, circumstances indicate that the seller, although not of these classes, has this superior knowledge or skill, and that this fact affected the buyer, the seller should be held to the greater undertaking.

Where the seller is the manufacturer and the goods are made to order, there is an undertaking by him that they are free from defects in the process of manufacture.[1] The rule should be, and probably is, the same where the goods are not made to order but are not specific,[2] and even where they are specific.[3] The buyer naturally relies upon the manufacturer as much in the last instance as in the first. A grower's undertaking is substantially the same as that of a manufacturer; [4] that is, there is an undertaking by the grower that his product is free from defects arising from the method or process of culture.

The undertaking by the manufacturer should not be held to extend to defects in the material which he uses if they are not discoverable during the process of manufacture.[5] It is uncertain whether this limitation will be generally recognized. It is a proper one. The manufacturer's undertaking should be coextensive only with his superior opportunity, but he has no opportunity to guard against any defects except those which result from the process of manufacture or are discoverable during that process.

Where the buyer inspects the goods before purchasing, the manufacturer's undertaking should not be held to cover defects which are apparent on inspection to a person of the buyer's skill.[6] That he inspected has a tendency to show that he relied upon his own knowledge and skill rather than that of the seller, and to the

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[1] Drummond *v.* Van Ingen, 12 App. C. 284; Hoe *v.* Sanborn, 21 N. Y. 552; Carleton *v.* Lombard; 72 Hun, 254 (*dictum*).

[2] Pease *v.* Sabin, 38 Vt. 432.

[3] Jones *v.* Bright, 5 Bing. 533; Larson *v.* The Aultman & Taylor Co., 86 Wis. 281.

[4] Beals *v.* Olmstead, 24 Vt. 114; White *v.* Miller, 71 N. Y. 118.

[5] Hoe *v.* Sanborn, 21 N. Y. 552 (*dictum*); Bragg *v.* Morrill, 49 Vt. 45; Wilson *v.* Lawrence, 139 Mass. 318; *contra*, Jones *v.* Bright, 5 Bing. 533.

[6] Barnett *v.* Stanton, 2 Ala. 181.

extent to which he did so he should not be protected. It would probably be held that the seller was not liable for these defects.

The undertaking of a seller of provisions has been treated occasionally as if it were an exception to the general rule, but this is unwarranted. In an ordinary sale of provisions, the seller's undertaking is not different from that of a seller of any other article.[1] Where the seller is a dealer and the buyer a consumer, there is probably an undertaking that the provisions are suitable for consumption;[2] but even this has been more frequently assumed than decided. It has been stated that it rested upon certain early penal statutes prohibiting the sale of unwholesome food, and at other times that it was a requirement of public policy. Whatever the origin of the rule, the best reason for it — one which fully justifies it — is that a dealer has skill and opportunity superior to that of the consumer which makes it natural that the latter should rely upon the former. It follows that the undertaking of a dealer in provisions who sells to a consumer should be gauged by the same measure which regulates the undertaking of any other seller who occupies a position of superiority and sells an article to be used for a particular purpose. It has been held properly that there is no undertaking by a dealer in provisions where it is evident that the buyer could not have relied upon the former's skill or knowledge.[3] The dealer's undertaking should be held to exist whether the provisions are specific or not, but should not extend to defects which are evident on inspection, if they were inspected. It cannot safely be said to be settled that the undertaking of a dealer selling to a consumer differs from that of an ordinary seller of goods.

Where a seller contracts to supply goods to be used for a particular purpose, and the circumstances are such that the buyer naturally relies upon the judgment or skill of the seller, there is an undertaking by the latter that they shall be or are reasonably adapted to this purpose. To raise this undertaking, the three necessary facts are: that the sale is for a particular purpose; that the seller's position was one of skill or knowledge superior to that of the buyer's; and that the buyer's position was such that he

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1 Burnby *v.* Bollett, 16 M. & W. 645; Emmerton *v.* Matthews, 7 H. & N. 586; Giroux *v.* Stedman, 145 Mass. 439. But see Hoover *v.* Peters, 18 Mich. 51.

2 Hoover *v.* Peters, 18 Mich. 51.

3 Julian *v.* Laubenberger, 38 N. Y. Sup. 1052. See also Weidman *v.* Keller, 58 Ill. App. 382.

would naturally rely upon this superiority. It is only when these conditions exist that the frequently repeated statement is true that where goods are sold to be used for a particular purpose, there is an implied warranty that they are reasonably fit for the purpose.

It is purely a question of fact in any case whether the sale is for a particular purpose. The contract must have been made with direct reference to the intended use, if the latter is to be considered a material part of the contract. The use which is to be made of the goods, although considered by the buyer and seller, is frequently merely incidental. Where an article is ordered by description, the mere fact that the seller knew for what purpose the buyer intended to use it is not enough to require a finding that it was supplied for a particular purpose,[1] or possibly even to sustain such a finding.[2] The fact that the goods were ordered for the particular purpose strongly indicates that the purpose is a part of the contract.

The case occurring most frequently in which the seller's position is one of knowledge or skill superior to that of the buyer's is that in which he is a manufacturer. A seller who manufactures goods to order for a particular purpose, undertakes that they will not be unfit for the purpose through anything arising from the process of manufacture or discoverable therein.[3] This undertaking should not be held to extend to any unfitness which is due to defects in material which are not discoverable during that process.[4] This distinction has not been noticed in the cases generally, either to be denied or enforced, but should be maintained, as a manufacturer has no knowledge or skill superior to the buyer's, touching an unfitness of this kind. The chances are not against this view's being sustained.

Where the seller is the manufacturer and the goods, although not made to order, are not specific, he should be, and probably is, liable to the same extent that he is when they are made to order.[5] There is the same reason for the undertaking.

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[1] Jarecki Mfg. Co., Lim., *v.* Kerr, 30 Atl. (Pa.) 1019. See also Shepherd *v.* Pybus, 3 M. & Gr. 868.

[2] Dounce *v.* Dow, 64 N. Y. 411.

[3] Randall *v.* Newson, 2 Q. B. D. 102.

[4] Bragg *v.* Morrill, 49 Vt. 45; *contra*, Jones *v.* Bright, 5 Bing. 533. But *semble* Dounce *v.* Dow, 64 N. Y. 411.

[5] Pease *v.* Sabin, 38 Vt. 432; Poland *v.* Miller, 95 Ind. 387; Downing *v.* Dearborn, 77 Me. 457; Zimmerman *v.* Druecker, 44 N. E. R. (Ind.) 557.

Where the goods are specific, the undertaking should have the same scope.[1] The reason for it is just as strong in this instance as in the others. The buyer's natural reliance upon the manufacturer is the same. The manufacturer would probably be held generally to the same undertaking.

Although the case arising most frequently in which the seller occupies a position of knowledge or skill superior to that of the buyer's is where the seller is the manufacturer, yet he may occupy this position when he is merely a dealer. To the extent of this superiority he should be held to the same undertaking as a manufacturer. It is not certain that this view would be approved generally. Unless we are to regard the rule which holds a manufacturer to this undertaking as arbitrary, we should extend it to all persons who come within the reason for it. It is true that generally the seller who is a dealer merely occupies no position of advantage over the buyer, but this is not always true. Where a buyer orders goods by a general description for a particular purpose, he may place upon the seller the necessity of exercising a choice which he has no opportunity to exercise for himself. If the seller desires to act under these circumstances, he may properly be held to an undertaking that he has selected the proper kind of goods. The seller's undertaking in any case should not be held to extend to unfitness arising from defects of material or construction which are not discoverable after the goods are completed,[2] as his superiority to the buyer does not extend to these, but should be limited to inherent inadaptability. It has been held that a dealer who occupies such a position that the buyer naturally relies upon his skill or judgment undertakes that goods which he supplies for a particular purpose are reasonably fit for the purpose.[3] In these cases nothing is said relative to limiting the rule to inherent inadaptability, and it was not necessary to do so. As it is uncertain whether the rule holding dealers liable would be generally followed, so it is whether it would be limited as suggested. It is

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[1] Beals *v.* Olmstead, 24 Vt. 114; Rose *v.* Meeks, 59 N. W. R. (Ia.) 30; Boothby *v.* Scales, 27 Wis. 626; Snow *v.* Shomacker Mfg. Co., 69 Ala. 111 (*dictum*). See also Kellogg *v.* Hamilton, 110 U. S. 108. But see Sanborn *v.* Herring, 6 Am. L. Reg. N. S. 457.

[2] White *v.* Oakes, 88 Me. 367; Hight *v.* Bacon, 126 Mass. 10.

[3] White *v.* Gresham, 52 Ill. App. 399; Brown *v.* Edington, 2 M. & G. 279; Bigge *v.* Parkinson, 7 H. & N. 955; Jones *v.* Just, L. R. 3 Q. B. 197 (*dictum*).

likewise uncertain whether a distinction would be made between specific and non-specific goods. None should be made.

The third requisite for this undertaking by the seller is that the buyer's position is such that he naturally relies upon the seller's superiority. Generally, where the buyer has an opportunity to inspect before purchasing, there is no undertaking by the seller covering any lack of fitness which is apparent on inspection.[1] By "apparent" is meant apparent to one of the buyer's skill. A manufacturer should be held to have undertaken that the goods are fit, although there is an inspection by the buyer and the unfitness is discoverable on inspection, provided it is not evident to one of the buyer's skill.[2] The fact that there was an inspection by the buyer should not affect the seller's undertaking covering any unfitness which is not discoverable on inspection.[3]

Where goods of a known, defined kind are ordered by a specific description, there is no undertaking by the seller that they shall be fit for any particular purpose, whether the seller is a manufacturer[4] or a dealer merely.[5] The fact that the buyer specifically describes the goods indicates that he is relying upon his own judgment. If, however, the other requisites for an undertaking of fitness by the seller are present, he should not be held to be relieved by the description by the buyer from liability for any inadaptability except that which arises from the conformity of the goods to the description. He should be held to undertake that the goods are fit for the particular purpose, except in the particulars in which their correspondence to the description makes that impossible. It is to the extent of the latter particulars only that the buyer has indicated that he relies upon his own judgment.

The combinations of circumstances which give rise to warranties and agreements of that nature are so varied that pages suffice to give merely a suggestion of their variety, and even chapters do them but scant justice. The decisions on the subject rest generally consistently upon the two reasons already suggested. One is

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[1] Hight *v.* Bacon, 126 Mass. 10 (*dictum*).

[2] Boothby *v.* Scales, 27 Wis. 626.

[3] Jones *v.* Bright, 5 Bing. 533; Beals *v.* Olmstead, 24 Vt. 114; Pease *v.* Sabin, 38 Vt. 432.

[4] Chanter *v.* Hopkins, 4 M. & W. 399; Port Carbon Iron Co. *v.* Groves, 68 Pa. St. 149; Jarecki Mfg. Co., Lim., *v.* Kerr, 30 Atl. (Pa.) 1019; J. T. Case Plow Works *v.* Niles & Scott Co., 63 N. W. R. (Wis.) 1013. See also Cunningham *v.* Hall, 4 Allen, 268.

[5] Dounce *v.* Dow, 64 N. Y. 411; Jones *v.* Just, L. R. 3 Q. B. 197 (*dictum*).

that a buyer who purchases goods which he has never had an opportunity to examine should be protected against those things which an examination would have revealed to him. The other is that a buyer who naturally relies on the representations or superior knowledge or skill of a seller should be protected to the extent of this natural reliance. If, in any case, neither reason for protecting the buyer exists, the rule by which it is decided is *caveat emptor*.

Edward F. McClennen.

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